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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/831,216	05/04/2001	Jan Nevermann	H&U104	1455

7590 04/23/2002

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EXAMINER

BAHAR, MOJDEH

ART UNIT	PAPER NUMBER
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1617

DATE MAILED: 04/23/2002

9

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	09/831,216	NEVERMANN ET AL.
	Examiner Mojdeh Bahar	Art Unit 1617

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1) Responsive to communication(s) filed on 23 January 2002.

2a) This action is **FINAL**.      2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4) Claim(s) 11-22 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 11-22 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11) The proposed drawing correction filed on \_\_\_\_\_ is: a) approved b) disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12) The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some \* c) None of:

1. Certified copies of the priority documents have been received.

2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.

3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) The translation of the foreign language provisional application has been received.

15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

1) Notice of References Cited (PTO-892)      4) Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)      5) Notice of Informal Patent Application (PTO-152)

3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) 5.      6) Other: \_\_\_\_\_.

## DETAILED ACTION

Applicant's response to the first office action of July 5, 2001, submitted January 23, 2002 (Paper No. 8) is acknowledged.

### *Claim Rejections - 35 USC § 112*

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 11-22 rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 12-21 recite the limitations "according to claim 1", "according to claim 4", and "according to claim 5" in their first line. There is insufficient antecedent basis for this limitation in the claim. Note that claims 1-10 have been cancelled. In order to expedite prosecution all claims referring to claim 1 have been interpreted to depend from claim 11, all claims referring to claim 4 have been interpreted to depend from claim 14, all claims referring to claim 5 have been interpreted to depend from claim 15.

The term "surfaces surrounding plants" in claims 11 and "immediate environment" in claim 22 are relative terms which renders the claim indefinite. The term "immediate environment" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. One of ordinary skill would not know the parameters defining the immediacy of the environment. Is "immediate environment" the soil in which the

plant is planted? Is it the aerial space occupied by the plant? Is the forest/garden/orchard where the plant inhabits its immediate environment?

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 11-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over applicant's admissions regarding the prior art in the specification in view of Moberg (WO 96/11572).

On page 4 of the specification, applicants disclose that two German patents (DE OS 3227126 and 3229097) teach that certain combinations of anionic surfactants, aliphatic and aromatic carboxylic acids as well as a few heteroatomic acids are capable of killing off viruses, bacteria and fungi.

Applicant's admissions regarding the prior art on page 4 of the specification, do not teach the employment of triglycols in its combination composition capable of killing off viruses, bacteria and fungi. Applicant's admissions also do not teach specific aromatic or aliphatic carboxylic acids to be employed in its combination composition. Further, applicant 's admissions do not teach a method of combatting microorganisms employing its combination composition.

Moberg teaches an antimicrobial/disinfectant composition comprising carboxylic acids such as propionic acid, hydroxypropionic acid, see particularly claim 4. Moberg further teaches

the employment of propylene glycol and butylene glycol in its composition, see particularly claim 3. Moberg further teaches a method of combatting microorganisms employing carboxylic acids and diols, see particularly claim 12.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to employ a diol (e.g. propylene glycol) in the combination composition restated by the applicant on page 4 of the specification. It would have also been obvious to employ the claimed carboxylic acids and diols in a method of combating pathogenic organisms.

One of ordinary skill in the art would have been motivated to employ diol (e.g. propylene glycol) in the combination composition restated by the applicant on page 4 of the specification because diol are known to be useful in antimicrobial compositions. It is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be useful for the very same purpose, *In re Kerkhoven*, 205 USPQ 1069, 1072 (CCPA 1980). Moreover, the employment of two agents known to be useful in a method of combating microorganisms would be reasonably expected to be useful in combating pathogenic microorganisms regardless of the host. The two agents, singly or in combination, would be expected to exhibit antipathogenic activities, regardless of its cause, absent evidence to the contrary. No such evidence is seen.

#### ***Response to Arguments***

Applicant first argues that all the prior art references are said to be useful against human or zoological pathogens, whereas the claimed composition herein has a high degree of effectiveness against phytopathogens. Note that claims 11-21, are all drawn to a composition and the recitation of intended use in a claim drawn to a composition does not further limit the

claim. As to claim 22, the only claim drawn to a method, the prior art references meet all the claimed limitations because two agents known to be useful in a method of combating microorganisms would be reasonably expected to be useful in combating pathogenic microorganisms regardless of the host. The two agents, singly or in combination, would be expected to exhibit antipathogenic activities, regardless of its cause.

Applicant then argues that in order to assess the effectiveness of the disinfecting agents of the prior art against phytopathogens, in vitro experimentation is needed. "However, in the course of deployment of these preparations on living plants during the testing for any side-effects on plants, the test plant showed severe damage in the form of burns." Note that no data showing the attorney's assertions has been presented and attorney's argument do not take the place of scientific data. Moreover, damaging or preserving the plant parts is not a limitation recited in any of the claims 11-22. Note that rebuttal arguments based on unclaimed limitations are moot.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event,

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however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mojdeh Bahar whose telephone number is (703) 305-1007. The examiner can normally be reached on (703) 305-1007 on Monday, Tuesday, Thursday and Friday from 8:30 a.m. to 6:30 p.m.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Minna Moezie, J.D., can be reached on (703) 308-4612. The fax phone number for the organization where this application or proceeding is assigned is (703) 308-4556.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.

Mojdeh Bahar  
Patent Examiner  
April 17, 2002

  
RUSSELL TRAVERS  
PRIMARY EXAMINER  
GROUP 1200